IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
DECEMBER 1, 2009 Session

SEAN ERIC VON TAGEN v. ROBIN LYNN VON TAGEN

Direct Appeal from the Chancery Court for Williamson County
No. 30425 Timothy L. Easter, Chancellor

No. M2009-00850-COA-R3-CV - Filed March 12, 2010

This appeal involves a father's petition for modification of the divorce decree, seeking a reduction of his alimony and child support obligations. Pursuant to the divorce decree, Father was obligated to pay Mother $3,000 per month in rehabilitative alimony and $2,000 per month in child support. The trial court granted the petition, reducing the alimony obligation to $750 per month and the child support obligation to $1,609 per month. The court refused to find the father voluntarily underemployed, but it imputed income to the mother, who was unemployed. The court denied both parties' requests for attorney's fees. Mother appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the Court, in which HOLLY M. KIRBY, J., and J. STEVEN STAFFORD, J., joined.

James L. Weatherly, Jr., Nashville, Tennessee, for the appellant, Robin Lynn von Tagen

Mark T. Freeman, Nashville, Tennessee, for the appellee, Sean Eric von Tagen

OPINION

I. FACTS & PROCEDURAL HISTORY

Sean Eric von Tagen ("Father") and Robin Lynn von Tagen ("Mother") were married for fourteen years before they were divorced by decree on February 15, 2006. The parties had four sons, who were ages 11, 9, 6, and 4 at the time of the divorce. Pursuant to the marital dissolution agreement ("MDA") and parenting plan incorporated into the final decree, Mother and Father would each have residential time with the children for 182.5 days per year, and they would alternate visitation every other week.

The parenting plan stated that Father's gross monthly income was $7,000 and Mother's gross monthly income was $200. Using these figures, Father's presumptive child support obligation was $743, but he agreed to pay an upward deviation for a total monthly child support obligation of $2,000.[1] The parenting plan provided that Father would pay this $2,000 per month in child support until the parties' youngest child reached the age of 18 or graduated from high school. The plan also provided that court approval was required before the child support obligation could be reduced or modified. The marital dissolution agreement further provided that Father would pay Mother $3,000 per month as rehabilitative alimony until their youngest child reached the age of 18, Mother cohabited with a member of the opposite sex outside of marriage, or either party died.

Two years later, on March 27, 2008, Father initiated the proceedings giving rise to this appeal by filing a petition to modify the divorce decree, alleging that a significant change in circumstances had occurred regarding his income, which was not anticipated or foreseeable at the time of the divorce. Father sought to have the rehabilitative alimony payments reduced or terminated, and he requested that child support be set according to the child support guidelines. Mother filed an answer requesting that Father's petition be denied.

The trial court held a hearing on January 26, 2009, at which both parties testified. The parties' sons were ages 14, 12, 9, and 7 by this time. Father testified that for a period of seven years during the marriage, he was self-employed, working in the stock trading profession. His annual income exceeded $100,000 during some of those years. However, Father said that it became increasingly difficult to earn money in the stock market beginning in 2002. In the summer of 2003, Father left the stock trading profession after having made only $15,000 that year. According to Father, he realized that he "was not going to be able to continue to make money in the environment the stock market was in. . . . So [he] left when

[1] Father was also required to pay for the children's health insurance, uncovered medical and eye care expenses, and, if available through his work, dental, orthodontic, and optical insurance.

[he] found other employment that would give [him] about sixty to seventy thousand a year." Father then began working with a company that created personalized children's CDs, and he also devoted more time to certain website businesses that he had previously only operated as a hobby. In 2005, the year prior to the divorce, Father reported $77,000 in income on the parties' tax return.

Father acknowledged that when the parties entered into the MDA and parenting plan in February 2006, he was not actually earning $7,000 per month as stated in the parenting plan. He testified that he was not even "taking home" $5,000 per month at that time, although the MDA and parenting plan required him to pay Mother $2,000 in child support and $3,000 in rehabilitative alimony each month. Father explained that he agreed to the MDA and parenting plan containing those obligations because he was in the process of negotiating with a communications company for the purchase of his website business for a substantial sum of money. While Father conceded that he and the buyer had not discussed the purchase price, he said that he was led to believe that his business was worth around $1 million. Father testified that he and the buyer had discussed the potential value of the company based on "statistics [the] website was delivering." Father testified that the sale was expected to be either for a lump sum or in exchange for an employment contract whereby he would be employed with the communications company for "a substantial amount above a normal salary" for his position, with an ultimate value of around $1 million.

Father testified that he "fully expected" to complete the transaction shortly after the divorce. However, the company he was negotiating with subsequently told him "that they had some other priorities come up they had to focus on and they were going to have to put it off for a couple of months." Father said that he incurred a large amount of debt in order to continue meeting his obligations under the divorce decree, while he continued talking with the communications company. Then, in August of 2006, some six months after the divorce, representatives of the communications company informed him that they were no longer interested in completing the sale.[2]

Father testified that at the time of the divorce, he had actually believed that the sale would be completed very soon after the divorce proceedings. He said, "From every indication that I had, it was going to go through. It was a question of when and working out the details." According to Father, "all indications were that this [was] going to happen one way or the other." On cross-examination, Father was asked if he contemplated that the sale

[2] When Father learned this information, he filed a separate petition to modify the divorce decree, seeking a reduction of his obligations. However, the trial court denied his petition, finding that no change in circumstances had occurred because Father still owned the same business he had owned at the time of the divorce, and his tax return indicated a similar income.

might not go through, to which Father responded, "Yes, I contemplated it, but I felt like it would go through." Father conceded that he had agreed to the parenting plan and MDA "a little hastily," but he insisted that he signed them fully expecting to consummate the sale soon after the divorce for an approximate payout of $1 million. Father said he had informed Mother that he would be able to "come up with" the money for his child support and alimony obligations because he was going to be selling his company. He said he was "blind-sided" when the communications company backed out of the deal in August.

Father testified that when the sale did not go through, he continued trying to sell the business but was unsuccessful. He said he acquired a substantial amount of debt to pay the child support and alimony obligations, including credit card debt and business and personal loans. Father's tax return for 2006 reflected that he made $72,000, but he claimed that "in reality, most of that was just as a result of debt" because his company would borrow money and then pay it to him. Father testified that he "had run up all [the] debt that [he] could possibly run up," and that business vendors would no longer deal with his business because he was unable to pay down his accounts. Father testified that he was facing bankruptcy "both personally and business-wise," which ultimately forced him to sell his business for just $350,000 in September of 2007. Father paid approximately $110,000 of the sale proceeds to Wife in satisfaction of current and overdue child support and alimony debts. Father also settled debts with various creditors, most of which were in collections, for around $200,000. He testified that only about $27,000 of the sale proceeds remained, which he eventually spent on personal expenses for himself and the children over the next several months.

On October 1, 2007, approximately two weeks after Father sold his website business, he began working for his parents' business for $50,000 a year plus health benefits. Father's parents' business was based in Oregon, and he was employed as the director of sales and marketing for the company's new product line of tabletop photo studios. Father said he basically tries to sell the product both online and to distributors. Father's monthly gross income was $4,166.67, and after deductions for federal withholding and health insurance, his net take-home pay was $2,999.71. At the hearing, Father submitted a list of his current monthly expenses, which totaled $2,735.41, excluding alimony and child support. Father testified that he was living paycheck to paycheck and that he had liquidated his retirement, savings, and checking accounts.

Mother was unemployed at the time of the hearing, and she had recently started receiving food stamps. Mother acknowledged that there was "nothing wrong" with her that prevented her from working. Mother was a college graduate, but she had primarily stayed at home with the children during the marriage, working various part-time jobs at different times. At the time of the divorce in February 2006, Mother had been working part-time at a preschool and also doing some freelance work, apparently doing hair and makeup, for a

modeling agency. In the summer of 2006, Mother went to California for several weeks to attend an intensive course in order to become a makeup artist. Father testified that Mother was employed with a hair salon in Franklin for several months in 2006 and 2007, earning ten dollars an hour. Mother enrolled in a cosmetology school in November of 2007, and she graduated in 2008, about ten months before the hearing. However, Mother did not generate any income as a makeup artist in 2008.

Mother testified that she had no income other than what she received from Father. Mother had prepared a summary of her monthly expenses, which totaled $9,700. She explained, "I have been living, basically, the same way I was living all through our marriage and what I'm used to."

The trial court entered its final order on April 3, 2009. The court found that a significant variance had been established in order to modify Father's child support obligation. In calculating Father's income, the court averaged his total income from 2007, which was $395,930 (including the one-time capital gain from the sale of his business), and his $50,000 income in 2008 and in 2009, resulting in an average gross monthly income of $13,775. The court then found that it was appropriate to impute "the standard income for females in the state of Tennessee of $2,441.00 a month and a yearly income of $29,300.00 to [Mother]."[3] Using those figures, the court set Father's child support obligation at $1,609 per month, based upon the child support guidelines, retroactive to April of 2008, which was the month after he filed his petition for modification.

Next, the court noted that an award of rehabilitative alimony remains in the court's control for the duration of the award and may be modified upon a showing of a substantial and material change in circumstances. Comparing the circumstances at the time of the divorce with those existing at the time of Father's petition, the court determined that Father had demonstrated a substantial and material change in circumstances due to the facts regarding the sale of his company and his resulting employment at a reduced income. The court then determined that a modification of his alimony obligation was warranted based upon the statutory factors, and it reduced his monthly obligation to $750, subject to the same conditions set forth in the final decree of divorce. The court entered a judgment against Father for $5,308 for his combined arrearage for alimony and child support, and it ordered both parties to pay their own attorney's fees. Mother timely filed a notice of appeal.

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[3] The child support guidelines provide that "[t]hese figures represent the full time, year round workers' median gross income, for the Tennessee population only, from the American Community Survey of 2006 from the U.S. Census Bureau." Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(2.)(iv)(I)(III.).

II. ISSUES PRESENTED

On appeal, Mother presents the following issues for review, slightly restated:

1. Whether the trial court erred in failing to find that Father's agreement to pay $3,000 per month in alimony and $2,000 per month in child support was a nonmodifiable part of the property division;
2. Whether the trial court erred in modifying Father's alimony obligation because
   (a) Father's voluntary sale of his business did not constitute a substantial change in circumstances;
   (b) Father is voluntarily underemployed; and
   (c) the statutory factors do not support a modification of the alimony obligation;
3. Whether the trial court erred in modifying Father's child support obligation because
   (a) the circumstances which caused the child support deviation have not changed;
   (b) Father is voluntarily underemployed; and
   (c) Mother is not voluntarily underemployed;
4. Whether the trial court erred in failing to award Mother her attorney's fees and expenses.

Father asks this Court to affirm the trial court's ruling. Both parties request an award of attorney's fees on appeal. For the following reasons, we affirm the decision of the chancery court. In addition, we decline to award either party attorney's fees on appeal.

III. DISCUSSION

A. Modifiable Obligations

Mother's first argument on appeal is that Father's rehabilitative alimony and child support obligations were actually part of the property division, and as such, the trial court lacked jurisdiction to modify them. Mother's brief on appeal states that Father agreed to pay these amounts "in exchange for all of [Mother]'s marital interest in [Father's] business." Father denies any such agreement, claiming that neither party intended that the payments would represent a division of the marital estate. The MDA stated that Father owned the business interest, and that he would be awarded all of the business and its corresponding debts. Father points out that although he received the business and a vehicle, Mother was awarded sole ownership of the marital residence in Brentwood, most of its furnishings, two vehicles, and nearly $60,000 in cash, and in addition, Father was ordered to pay all of Mother's credit card debt and medical bills.

From our review of the record, Mother did not raise this issue in the trial court.[4] Nevertheless, we find no merit in the argument. It is true that court orders directing payment of alimony may be modified upon a showing of a substantial and material change of circumstances, while orders distributing marital property are not subject to modification. ***Johnson v. Johnson***, 37 S.W.3d 892, 895 (Tenn. 2001). "After a divorce decree becomes final, a marital dissolution agreement becomes merged into the decree as to matters of child support and alimony, and the trial court has continuing statutory power to modify the decree as to those matters when justified by changed circumstances." ***Hannahan v. Hannahan***, 247 S.W.3d 625, 627 (Tenn. Ct. App. 2007) (citing *Penland v. Penland*, 521 S.W.2d 222, 224 (Tenn. 1975)). However, "[t]o the extent that a marital dissolution agreement is an agreement as to distribution of marital property it does not lose its contractual nature by merger into the decree of divorce and is not subject to later modification by the court." ***Id.*** (citing *Towner v. Towner*, 858 S.W.2d 888 (Tenn. 1993)).

An MDA is a contract and as such should be construed like other contracts with respect to its interpretation, meaning and effect. ***Bogan v. Bogan***, 60 S.W.3d 721, 730 (Tenn. 2001); ***Johnson***, 37 S.W.3d at 896. "'When resolving disputes concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language.'" ***Id.*** (quoting *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999)). If the contract language is unambiguous, we must interpret it as written rather than according to the unexpressed intention of one of the parties. ***Bradson Mercantile, Inc. v. Crabtree***, 1 S.W.3d 648, 652 (Tenn. Ct. App. 1999).

This is not the first case in which a party has attempted to characterize monthly payments made pursuant to a divorce decree as part of the marital property division rather than alimony. In ***Towner v. Towner***, 858 S.W.2d 888, 891 (Tenn. 1993), the Supreme Court determined that an MDA's provision for monthly "alimony" payments to the wife was "in effect a distribution to her of a portion of the [marital property]," which was not subject to modification. However, that MDA expressly stated, "The spousal support/alimony is specifically in consideration of the wife waiving any right to the husband's military retirement," which retirement was marital property. ***Id.*** at 889. As such, the Court concluded that the "alimony" agreement was "essentially a property settlement agreement, rather than an order of support." ***Id.*** at 891.

Similarly, in ***Hussey v. Hussey***, No. 01A01-9504-PB-00181, 1996 WL 165512, at *6 (Tenn. Ct. App. Apr. 10, 1996), the Court found that the parties intended that an award of

[4] In fact, Mother never even testified to any such agreement. When she was asked how the alimony and child support, as provided in the final decree, actually came about, Mother replied, "From what I remember, that is what we agreed to how I could support my kids and live without having to work."

alimony "would, in effect, be a division of the marital estate." The parties' marital estate was valued at $14 million, from which the wife received a lump sum of $100,000 in addition to weekly, monthly, and yearly alimony payments. ***Id.*** at *5. The Court explained that a divorce decree incorporating a property settlement is to be construed like any other written instrument, and its words should be given their usual, natural, and ordinary meaning. ***Id.*** Still, taking the entire agreement into consideration, the Court concluded that "a plain reading of the [property settlement agreement] reveals on its face that the payments made to Wife represent her share of the marital property." ***Id.*** at *6.

In ***Miller v. Davidson***, No. M2006-00099-COA-R3-CV, 2006 WL 2852396, at *1 (Tenn. Ct. App. Oct. 5, 2006), the Court again found that certain monthly payments were part of the marital property distribution rather than alimony, where the MDA stated that the monthly payments were being made "[a]s a further division of marital assets." The Court found that the MDA was "clear on its face and require[d] no construction." ***Id.*** at *3. Because the MDA was unambiguous, the Court needed "no additional evidence, parol or otherwise, to help us understand the legal import of the disputed portion of the [MDA]." ***Id.*** at *3, n.5; *see also* ***Marcum v. Trippett***, No. W1999-00255-COA-R3-CV, 2000 WL 33191370, at *3 (Tenn. Ct. App. Nov. 21, 2000) (interpreting the unambiguous terms of an MDA to conclude that monthly payments were for the purchase of the wife's interest in the marital property, not alimony); ***Marquess v. Marquess***, No. 03A01-9707-GS-00260, 1997 WL 772876, at *2-3 (Tenn. Ct. App. Dec. 10, 1997) (same).

Finally, in ***Givler v. Givler***, 964 S.W.2d 902, 907 (Tenn. Ct. App. 1997), a wife argued, as Mother does here, that her husband's monthly alimony obligation was "really a part of the division of the parties' marital property, and thus not subject to modification in any event." The Court rejected her argument and distinguished ***Towner*** because the divorce decree specifically stated that the payment was "in the form of alimony in futuro." ***Id.***

In this case, the parties' MDA did not state or imply that Father's payment of rehabilitative alimony and additional child support was intended to compensate Mother for her share of the marital property. The MDA provided, in a paragraph entitled "Rehabilitative Alimony," that Father would pay Mother $3,000 per month in "rehabilitative alimony" until their youngest child turned 18, either party died, or Mother cohabited with a member of the opposite sex outside of marriage. By statute, "[a]n award of rehabilitative alimony shall remain in the court's control for the duration of such award, and may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of a substantial and material change in circumstances." Tenn. Code Ann. § 36-5-121(e)(2). In addition to the fact that the parties specifically referred to the payments as "rehabilitative alimony," we find that their decision to make such payments terminable upon Mother's cohabitation or either party's death to be further evidence that the payments were not intended to compensate Mother for

her share of the marital estate. Furthermore, the parties' MDA contained a separate paragraph entitled "Division of the Marital Estate," which provided that Father would pay Mother $50,000 "in the form of alimony in solido, non-modifiable." The parties could have included the $3,000 payments in that paragraph as well if their intention was as Mother suggests. We likewise find no support for Mother's suggestion that Father's additional child support obligation was part of the marital property division. The parenting plan recognized that the child support obligation could be reduced or modified with court approval. In sum, we conclude that these obligations were subject to modification by the trial court.

B. Alimony

Next, Mother argues that the trial court erred in modifying Father's alimony obligation because, according to Mother, Father's sale of the business was foreseeable and did not constitute a substantial change in circumstances, Father is voluntarily underemployed, and the statutory factors did not support a modification. We address each of these arguments in turn, keeping in mind the following standard of review:

> Because modification of a spousal support award is "factually driven and calls for a careful balancing of numerous factors," *Cranford v. Cranford*, 772 S.W.2d 48, 50 (Tenn. Ct. App. 1989), a trial court's decision to modify support payments is given "wide latitude" within its range of discretion, see *Sannella v. Sannella*, 993 S.W.2d 73, 76 (Tenn. Ct. App. 1999). In particular, the question of "[w]hether there has been a sufficient showing of a substantial and material change of circumstances is in the sound discretion of the trial court." *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999) (citations omitted). Accordingly, "[a]ppellate courts are generally disinclined to second-guess a trial judge's spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes." *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998); see also *Goodman v. Goodman*, 8 S.W.3d 289, 293 (Tenn. Ct. App. 1999) ("As a general matter, we are disinclined to alter a trial court's spousal support decision unless the court manifestly abused its discretion."). When the trial court has set forth its factual findings in the record, we will presume the correctness of these findings so long as the evidence does not preponderate against them. See, e.g., *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000); see also Tenn. R. App. P. 13(d).

Bogan, 60 S.W.3d at 727.

1. A Substantial and Material Change in Circumstances

As stated above, an award of rehabilitative alimony "may be increased, decreased, terminated, extended, or otherwise modified, upon a showing of a substantial and material change in circumstances." Tenn. Code Ann. § 36-5-121(e)(2). A change in circumstances is considered to be "substantial" if it significantly affects the obligor's ability to pay or the obligee's need for support. ***Bogan***, 60 S.W.3d at 728. A change in circumstances is deemed "material" if it occurred after the entry of the divorce decree ordering the payment of alimony, and it was not anticipated or within the contemplation of the parties at the time they entered into the property settlement agreement. ***Id.*** "The party seeking the modification has the burden of proving the substantial and material changes which justify it." ***Wright v. Quillen***, 83 S.W.3d 768, 772 (Tenn. Ct. App. 2002) (citing *Elliot v. Elliot*, 825 S.W.2d 87, 90 (Tenn. Ct. App. 1991)).

Mother argues that Father failed to prove a substantial and material change in circumstances because the sale of his business was foreseeable at the time of the divorce and Father admitted on cross-examination that he contemplated that the sale might not go through. The trial court compared the circumstances at the time of the divorce with those existing at the time of Father's petition, and concluded that a substantial and material change in circumstances had occurred. The court found that Father's commitment to pay Mother $3,000 per month in rehabilitative alimony was based upon his annual salary at the time (of around $75,000) and upon the anticipated sale of his company for $1 million. The court concluded that Father's failure to obtain the anticipated sale price and his subsequent employment at a reduced income after the sale constituted a substantial and material change of circumstances. Again, the question of whether there has been a sufficient showing of a substantial and material change of circumstances is in the sound discretion of the trial court. ***Bogan***, 60 S.W.3d at 727. We find that the evidence supports the trial court's decision.

Father testified that at the time of the final decree, he "fully expected" to complete the sale of his business for approximately $1 million shortly after the divorce proceedings. He said, "From every indication that I had, it was going to go through. It was a question of when and working out the details." He also said "all indications were that this [was] going to happen one way or the other." Although Father did concede on cross-examination that he "contemplated" that the sale might not go through, he insisted that he thought the sale would go through and that he was "blind-sided" when it did not. There is no evidence that Father anticipated, or should have foreseen, that the buyer would back out, that he would be unable to sell the business to anyone else for nearly two years, and that when he did sell it, he would realize only one-third of the profit he would have made from the first sale. Father testified that he and the first buyer had discussed the potential value of the company based on "statistics [the] website was delivering," and that he was led to believe that his business was

worth around $1 million. Considering all the circumstances, we agree with the trial court's conclusion that Father's change in circumstances was both substantial and material.

2. Father's Employment

Next, Mother argues that Father is willfully and voluntarily underemployed, and thus, the trial court should have refused to modify his alimony obligation.

"It is clear that willful and voluntary unemployment or underemployment will not provide a basis for modifying spousal support." ***Byrd v. Byrd***, 184 S.W.3d 686, 691 (Tenn. Ct. App. 2005) (citing *Watters*, 22 S.W.3d at 823). In order to determine whether a spouse is voluntarily underemployed, we consider his or her past and present employment, and the reasons for taking a lower paying job. ***Id.*** If the reason for taking a lower paying job is reasonable and made in good faith, the court will not find the person to be willfully and voluntarily underemployed. ***Id.***; *see also* ***Walker v. Walker***, No. M2002-02786-COA-R3-CV, 2005 WL 229847, at *2 (Tenn. Ct. App. Jan. 28, 2005).

"'Determining whether a person is wilfully and voluntarily underemployed is a fact-driven inquiry requiring a careful consideration of all the attendant circumstances.'" ***Lane v. Lane***, No. M2008-02802-COA-R3-CV, 2009 WL 3925461, at *6 (Tenn. Ct. App. W.S. Nov. 17, 2009) (quoting *Walker*, 2005 WL 229847, at *3). As such, an appellate court accords substantial deference to the trial court's decision, especially when it is premised on the trial judge's singular ability to ascertain the credibility of the witnesses. ***Walker***, 2005 WL 229847, at *3. In this case, the trial court found that Father's unanticipated reduction in income was "not as a result [of] his refusal to work." We agree.

Father has an undergraduate degree in business. He left the stock trading profession during the parties' marriage due to lack of income, and he testified that stock trading was "no longer a viable option." Father had been working for his parents' business for approximately fifteen months at the time of the hearing, making $50,000 a year. He testified that he did not "voluntarily unemploy [him]self" from his website business, as he would have faced bankruptcy if he did not sell it. Father testified that he did not have enough money to start another online business. He testified that before he began working for his parents' company, he sought employment within the Christian music industry, where he had been employed prior to selling his website business. Father said he contacted all of the major and minor labels that might be able to employ him, but there were no positions available because the music industry was beginning a downward slope. Father said, "I did find out that someone doing similar activities to what I was doing and running the website and selling advertising and managing a few employees would make somewhere from forty-five to fifty-five thousand dollars. And so I figured my kind of marketable salary was in the 50,000-dollar

range." Father said that he and his parents agreed upon a $50,000 salary based upon what they were already paying another employee and also because of the information he had learned about salaries for similar positions.

Father testified that he had continued seeking other outside employment in addition to working for his parents. Father said he was specifically searching for additional part-time employment at which he could work while the children were residing with Mother. Father testified that he had contacted temporary employment agencies, but that the agencies either were not hiring or had no part-time work available. Father said he had interviewed with UPS for a position working night shifts in a warehouse, but he was told that he could not work there on an every-other-week basis. Father explained that it was not feasible for him to work nights when he had the children. Father said he was also trying to sell old inventory and CDs on eBay or Amazon, and that he was able to earn about $300 over the holidays selling items on eBay.

Giving due deference to the trial court's assessment of the witnesses' credibility, we find no error in its conclusion that Father was not willfully or voluntarily underemployed.

3. The Statutory Factors

"A substantial and material change in circumstances does not automatically entitle the petitioner to a modification." ***Wright***, 83 S.W.3d at 773. A change in circumstances merely allows the obligor to demonstrate that reduction or termination of the award is appropriate. ***Bogan***, 60 S.W.3d at 730. "[W]hen assessing the appropriate amount of modification, if any, in the obligor's support payments, the trial court should consider the factors contained in Tennessee Code Annotated section [36-5-121(i)][5] to the extent that they may be relevant to the inquiry." ***Id.*** The two most important considerations in modifying the award are the financial ability of the obligor to provide support, and the financial need of the party receiving support. ***Id.***

On appeal, Mother claims that her need for support should have been the "single most important factor" in the trial court's analysis. Mother is mistaken, however, as the Supreme Court has stated:

> [W]hen deciding whether to *modify* a support award, the need of the receiving spouse cannot be the single-most dominant factor, as a substantial and material change in circumstances demands respect for other considerations. While the need of the receiving spouse remains an important consideration in

[5] The relevant factors previously appeared at Tennessee Code Annotated section 36-5-101(d)(1).

> modification cases, the ability of the obligor to provide support must be given at least equal consideration.

Bogan, 60 S.W.3d at 730.

Next, Mother claims that the trial court erroneously found that she and Father were "evenly balanced with respect to relative earning capacity, obligations, needs, and financial resources." The trial court's order actually states with regard to the first statutory criteria – the parties' "relative earning capacity, obligations, needs, and financial resources"[6] – that Mother and Father were "fairly balanced with [Father] being more economically advantaged in terms of his ability to earn income." We are unable to accurately compare the parties' financial resources due to the lack of evidence in the record. The trial court found that Mother had "equity in the former marital residence." When she was asked about this at the hearing, she said she thought that she owed $320,000 on the house, that she did not know whether the amount of equity exceeded $400,000, and that she did not have any intention of selling the house. Father testified that he had liquidated all of his retirement, savings, and checking accounts.

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[6] The complete list of factors listed at Tennessee Code Annotated section 36-5-121(i) is as follows:

> (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
> (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
> (3) The duration of the marriage;
> (4) The age and mental condition of each party;
> (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
> (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
> (7) The separate assets of each party, both real and personal, tangible and intangible;
> (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
> (9) The standard of living of the parties established during the marriage;
> (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
> (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
> (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

We agree with Mother, and the trial court, that Father was more economically advantaged with regard to earning capacity. Father had an extensive work history while Mother primarily stayed at home during the marriage and worked only part-time. We also note, however, that Mother is also a college graduate, and she had recently graduated from cosmetology school as well. She testified that she hoped to earn $4,000 per month once she establishes her business as a makeup artist.

Regarding the parties' needs and obligations, Mother points out that she had $9,700 in expenses each month with no income. But Father had $2,735.41 in monthly expenses *excluding* child support and alimony, and only $2,999.71 in net income. The trial court found that Mother was "living well beyond her means,"[7] and it similarly appears to this Court that Mother could reduce or eliminate many of her expenses. For example, Father listed $325 per month for food, while Mother listed $1,000 for food. In addition, Mother reported that each month she was spending $100 on furniture, $200 on clothing for herself, $200 on her own hair care, cosmetics, and "other grooming," $200 on her cell phone, $300 on gas and oil, $250 on vacation and travel, $40 on movies, $100 on "Other entertainment (Titans, Predators, Sounds, etc.)," $100 on pet expenses, $375 on gifts, and $40 on reading materials. "The parties' incomes and assets will not always be sufficient for them to achieve the same standard of living after divorce that they enjoyed during the marriage." ***Robertson v. Robertson***, 76 S.W.3d 337, 340 (Tenn. 2002).

Again, a trial court's decision to modify support payments is given "wide latitude" within its range of discretion. ***Bogan***, 60 S.W.3d at 727. "Because the form and amount of an alimony award lies within the sound discretion of the trial court, appellate courts will not overturn such awards absent an abuse of discretion." ***Fickle v. Fickle***, 287 S.W.3d 723, 736 (Tenn. Ct. App. 2008) (citing *Riggs v. Riggs*, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007); *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)). Considering Mother's need and Father's ability to pay, in addition to the other relevant factors, we cannot say that the trial court abused its discretion by modifying the rehabilitative alimony award to $750 per month.

C. Child Support

Mother contends that the trial court erred in modifying Father's child support obligation because, according to Mother, the circumstances that caused the deviation had not changed, Father was voluntarily underemployed, and Mother was not voluntarily

[7] When Mother was asked at the hearing, "So you have been living well beyond your means, would you agree?" she responded, "To the best of my ability, yes." She said that her lifestyle was being supported by money from her parents and credit cards.

underemployed.

"Courts are required to use child support guidelines developed by the Tennessee Department of Human Services 'to promote both efficient child support proceedings and dependable, consistent child support awards.'" ***Huffman v. Huffman***, No. M2008-02845-COA-R3-CV, 2009 WL 4113705, at *8 (Tenn. Ct. App. Nov. 24, 2009) (quoting *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 249 (Tenn. Ct. App. 2000)). However, "trial courts retain a certain amount of discretion in their decisions regarding child support, which decisions we review under an abuse of discretion standard." ***Id.*** (citing *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005)).

1. Changed Circumstances

"The modification of child support is governed by Tennessee Code Annotated section 36-5-101(g)." ***Wine v. Wine***, 245 S.W.3d 389, 393 (Tenn. Ct. App. 2007). The initial inquiry is "whether there is a 'significant variance' between the current obligation and the obligation set by the Guidelines." ***Id.*** at 394; *see* Tenn. Code Ann. § 36-5-101(g)(1). In this case, Mother concedes that, based upon the trial court's calculations, a significant variance existed. However, she argues that the trial court should not have modified Father's child support obligation because "the circumstances which caused the deviation have not changed."

Tennessee Code Annotated section 36-5-101(g)(1) provides that the trial court shall increase or decrease child support upon finding a significant variance "unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances that caused the deviation have not changed."[8] The trial court made the following findings relevant to this issue:

The business sold for $350,000.00 as compared to $1,000,000.00 which was

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[8] The Guidelines similarly provide:

> Upon a demonstration of a significant variance, the tribunal shall increase or decrease the support order as appropriate in accordance with these Guidelines unless the significant variance only exists due to a previous decision of the tribunal to deviate from the Guidelines and the circumstances that caused the deviation have not changed. If the circumstances that resulted in the deviation have not changed, but there exist other circumstances, such as an increase or decrease in income, that would lead to a significant variance between the amount of the current order, excluding the deviation, and the amount of the proposed order, then the order may be modified.

Tenn. Comp. R. & Regs. § 1240-02-04-.05(5).

> what [Father] anticipated receiving from the sale of the business. This difference in the anticipated price and the actual sales price constitutes an unanticipated decrease in the assets of [Father] thus an unanticipated reduction in his ability to provide support for his children in the manner that he had hoped.

As previously discussed, we agree with the trial court's finding that a substantial and material change in circumstances has occurred since the final decree of divorce. We likewise find that the circumstances causing the original deviation in child support have changed in a manner that significantly affected Father's ability to pay child support. We find no error in the trial court's decision regarding this issue.

2. Father's Employment

Next, Mother argues that the trial court should have refused to modify Father's child support obligation because he is voluntarily underemployed.

The Guidelines state that imputing additional gross income to a parent is appropriate if it is determined that he or she is "willfully and/or voluntarily underemployed or unemployed." Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(2.)(i)(I). "This is based on the premise that parents may not avoid their financial responsibility to their children by unreasonably failing to exercise their earning capacity." ***Massey v. Casals***, No. W2008-01807-COA-R3-JV, 2009 WL 4017256, at *6 (Tenn. Ct. App. Nov. 23, 2009). Therefore, a trial court may deny a petition for modification of child support if the significant variance is the result of willful or voluntary underemployment. ***Wine***, 245 S.W.3d at 394. "The burden of proving that a significant variance is the result of willful or voluntary underemployment is on the party opposing the modification." ***Id.*** (citing *Demers v. Demers*, 149 S.W.3d 61, 69 (Tenn. Ct. App. 2003); *Richardson*, 189 S.W.3d at 727). "The Guidelines do not presume that any parent is willfully and/or voluntarily under or unemployed." Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(2.)(ii). "The purpose of the determination is to ascertain the reasons for the parent's occupational choices, and to assess the reasonableness of these choices in light of the parent's obligation to support his or her child(ren) and to determine whether such choices benefit the children." ***Id.***

"A determination of willful and/or voluntary underemployment or unemployment is not limited to choices motivated by an intent to avoid or reduce the payment of child support. The determination *may* be based on any intentional choice or act that adversely affects a parent's income." Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(2.)(ii)(I) (emphasis added). However, "[i]f a parent's reasons for working in a lower paying job are reasonable and in good faith, the court will not find him or her to be willfully and voluntarily

underemployed." ***Owensby v. Davis***, No. M2007-01262-COA-R3-JV, 2008 WL 3069777, at *4, n.7 (Tenn. Ct. App. July 31, 2008) (citing *Richardson*, 189 S.W.3d at 726). Although it is not required that parents intend to avoid their child support obligations by their actions, "willful or voluntary unemployment or underemployment must result from an intent on the part of the parent to reduce or terminate his or her income." ***Wilson v. Wilson***, 43 S.W.3d 495, 497 (Tenn. Ct. App. 2000). Factors that may be considered when determining whether a parent is voluntarily underemployed include:

> (I) The parent's past and present employment;
> (II) The parent's education, training, and ability to work;
> (III) The State of Tennessee recognizes the role of a stay-at-home parent as an important and valuable factor in a child's life. In considering whether there should be any imputation of income to a stay-at-home parent, the tribunal shall consider:
>
> > I. Whether the parent acted in the role of full-time caretaker while the parents were living in the same household;
> > II. The length of time the parent staying at home has remained out of the workforce for this purpose; and
> > III. The age of the minor children.
>
> (IV) A parent's extravagant lifestyle, including ownership of valuable assets and resources (such as an expensive home or automobile), that appears inappropriate or unreasonable for the income claimed by the parent;
> (V) The parent's role as caretaker of a handicapped or seriously ill child of that parent, or any other handicapped or seriously ill relative for whom that parent has assumed the role of caretaker which eliminates or substantially reduces the parent's ability to work outside the home, and the need of that parent to continue in that role in the future;
> (VI) Whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the parent's obligation to support his/her children and, to this end, whether the training or education will ultimately benefit the child in the case immediately under consideration by increasing the parent's level of support for that child in the future;
> (VII) Any additional factors deemed relevant to the particular circumstances of the case.

Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(2.)(iii). "'Determining whether a parent is willfully and voluntarily underemployed and what a parent's potential income would be are questions of fact that require careful consideration of all the attendant circumstances.'" ***Reed v. Steadham***, No. E2009-00018-COA-R3-CV, 2009 WL 3295123, at *2 (Tenn. Ct. App. Oct. 14, 2009) (quoting *Owensby*, 2008 WL 3069777, at *4). The trial court has

considerable discretion in its determination of whether a parent is willfully or voluntarily underemployed. ***Hommerding v. Hommerding***, No. M2008-00672-COA-R3-CV, 2009 WL 1684681, at *7 (Tenn. Ct. App. W.S. June 15, 2009) (citing *Eldridge v. Eldridge,* 137 S.W.3d 1, 21 (Tenn. Ct. App. 2002)); *see also* ***Willis v. Willis***, 62 S.W.3d 735, 738 (Tenn. Ct. App. 2001). A trial court's determination regarding willful and voluntary underemployment is entitled to a presumption of correctness, ***Johnson v. Johnson***, No. M2008-00236-COA-R3-CV, 2009 WL 890893, at *7 (Tenn. Ct. App. Apr. 2, 2009), and "we accord substantial deference to the trial court's decision, especially when it is premised on the trial court's singular ability to ascertain the credibility of the witnesses." ***Reed***, 2009 WL 3295123, at *2.

The trial court in this case made the following findings regarding Father's employment:

> This unanticipated reduction in his ability to provide support for his children in the manner that he had hoped is not as a result [of] his refusal to work. In fact, the Court finds that [Father] has done a remarkably good job in keeping his finances in order during the last several months and that he did the appropriate and responsible act in bringing this matter back to court for this Court's assistance when he realized that he was not going to be able to continue to satisfy his obligations of child support in the future.

We find that the evidence does not preponderate against the trial court's finding that Father was not voluntarily underemployed. There was no evidence presented to suggest that Father sold his company and changed jobs with an intent to reduce or terminate his income. The trial court clearly credited Father's testimony and found his actions reasonable. Thus, we find no error in the court's decision not to impute additional income to Father.

3. Mother's Unemployment

After noting that the initial child support obligation was set based upon a gross monthly income of $200 for Mother, the court found that she was "capable of doing better" and had "more of [an] earning capacity per month" than was reflected in the parenting plan, "especially considering that [Mother] has a 50/50 split of parenting time with [Father] which allows her to work every other week without any parenting time obligations." The court further stated:

> This court finds that the circumstances of her life have changed. She has custody every other week giving her an opportunity to work. She has obtained vocational training and she has a significant amount of free time. She also has equity in the former marital residence. Therefore, [Mother] can contribute in

> a more substantial way in supporting her children. This Court realizes that this finding of fact . . . may cause her to have to adjust her lifestyle and spending habits. Nevertheless, this Court finds that [Mother] is currently living well beyond her means.

The trial court went on to impute an annual income of $29,300, or $2,441 per month, to Mother.[9] Mother argues on appeal that she is not voluntarily underemployed and that she has never been able to earn the amount of income imputed by the trial court.

As previously discussed, Mother was unemployed at the time of the hearing, but she agreed that there was "nothing wrong" with her that prevented her from working. The parties' sons were ages 14, 12, 9, and 7 at the time of the hearing and all attended school. Mother was a college graduate and had worked part-time jobs at various times during the marriage. At the time of the divorce, Mother was working part-time at a preschool and also doing freelance hair and makeup work for a modeling agency. Since the divorce, Mother had attended an intensive course in California to become a makeup artist, and she had graduated from cosmetology school. Father testified that Mother was employed with a hair salon in Franklin for several months in 2006 and 2007, earning ten dollars an hour. However, in the year before the hearing, Mother did not generate any income. When asked what efforts she had made to develop her income as a makeup artist, Mother stated, "I guess that would be business cards, handing them out, making contacts, letting people know that I'm a makeup artist." Mother testified that she had been trying to set up a studio in her house, but she said that she did not have enough money to purchase the necessary equipment in order to be licensed to practice at home, as it would cost between $7,000 and $10,000 to set up a home studio. Mother testified that she hoped to earn $4,000 a month once she gets her makeup artist business going. She said she was committed to pursuing that plan rather than seeking other employment, and that she had tried to find other employment and could not. When asked whether she could go out and find a job making ten dollars an hour, Mother simply replied, "I don't believe so." Father's attorney later stated, "really, there's no – you've just

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[9] The Guidelines provide:

> Once a parent that has been found to be willfully and/or voluntarily under or unemployed, additional income can be allocated to that parent to increase the parent's gross income to an amount which reflects the parent's income potential or earning capacity, and the increased amount shall be used for child support calculation purposes. The additional income allocated to the parent shall be determined using the following criteria:
>
> I. The parent's past and present employment; and
>
> II. The parent's education and training.

Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(2.)(ii)(II).

made a conscious decision not to work a 40-hour week as an employee for somebody; correct," to which Mother responded, "Because I'm a mom, yes." Mother claimed that there are not many mothers who have four sons and work forty hours a week.

Mother testified that the children ride the bus to school and are gone between 8:00 a.m. and 3:00 p.m. When asked how she spends her time while the children are at school, Mother said that she volunteers at the school about once a week, and that she had been setting up her home studio, doing research, and handing out resumes. When asked what she does during the weeks when the children are with Father, Mother said her daily activities consisted of going to the YMCA to exercise, doing housework and preparing meals.

The rule that a "parent will not be allowed to lessen his child support obligation as a result of choosing to work at a lower paying job" applies to both the primary residential parent and the alternate residential parent. ***Johnson***, 2009 WL 890893, at *7. As stated above, determining whether a parent is willfully and voluntarily underemployed and what a parent's potential income would be are questions of fact requiring careful consideration of all the attendant circumstances, and we accord substantial deference to the trial court's decision, especially when it is premised on the trial court's singular ability to ascertain the credibility of the witnesses. ***Reed***, 2009 WL 3295123, at *2.

The trial court clearly discredited Mother's testimony that she was incapable of finding a job. Mother herself eventually conceded that she had "made a conscious decision not to work a 40-hour week as an employee." The court noted that Mother has a substantial amount of free time when she could be working, and it also found that Mother was living well beyond her means, indicating that Mother's lifestyle "appears inappropriate or unreasonable for the income claimed by the parent." *See* Tenn. Comp. R. & Regs. § 1240-02-04-.04(3)(a)(2.)(iii)(IV). Considering that Mother earned ten dollars an hour while working at a salon for several months after the divorce, *prior to* her graduation from cosmetology school, and in light of the fact that Mother recognized that she could make $4,000 per month, or $48,000 per year, upon establishing her own studio, we find that the trial court's finding of voluntary unemployment and its imputation of $29,300 in annual income to Mother are supported by the evidence. As such, we affirm the trial court's reduction of Father's child support obligation to $1,609 per month.

D. Attorney's fees

Mother claims that the trial court should have awarded her attorney's fees based upon the following provision of the MDA:

> **Enforcement Provision:** In the event either party has to petition the Court for enforcement of any of the provisions in this Agreement, then the party at fault shall be responsible for reasonable attorney fees, expenses and Court costs in the enforcement of same.

The trial court denied both parties' requests for attorney's fees. Because Mother did not petition the court for enforcement of the MDA, and Father was not found "at fault," we find no error in the trial court's decision.

Both parties have requested an award of their attorney's fees on appeal. We find it equitable to deny both parties' requests.

IV. CONCLUSION

For the aforementioned reasons, we affirm the decision of the chancery court. Costs of this appeal are taxed to the appellant, Robin Lynn von Tagen, and her surety, for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J., W.S.